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THE EFFECT OF CONDEMNATION PROCEEDINGS BY EMINENT DOMAIN UPON A POSSIBILITY OF RE- VERTER OR POWER OF TERMINATION

I. INTRODUCTION

When a land owner sells or donates land upon condition that it revert to him if not used in accordance with certain restrictions, he generally rests assured that restrictive covenants in the conveyance adequately protect his intentions and interests.¹ Unfortunately, his assurance may be ill conceived and his intent defeated if the land is later taken in eminent domain proceedings, for, when the conveyance does not specifically provide for a taking by condemnation, the transferee will usually receive the total condemnation award and the transferor to whom the land was to revert may receive nothing.

It is the purpose of this Comment to survey and analyze both the diverse awards which have resulted from takings by condemnation in such situations and the equally diverse rationales which have supported them. Factors such as the consideration paid, the transferor's intent, the transferee's intent, and the policies involved will be considered and changes in approach will be recommended. It is hoped that a knowledge of the different methods of dealing with the question will be of aid both to the attorney who must determine what result may be reached by the courts in his jurisdiction (especially if faced with a question of first impression) and the attorney who seeks to recover a condemnation award for his client or plans to guard against loss of interest through condemnation, as well as to the judiciary which must resolve such disputes.

II. BACKGROUND

The conveyance of a fee simple interest in real property, conditioned upon the use of that property for a specific purpose, gives the transferee a fee simple defeasible.² While there are several types of defeasible fees,³ distinguished according to the condition which terminates the fee

1. A landowner may, for example, wish to make a donation to a charity but may hesitate to give money out of fear that his identity may be soon forgotten. In that case, he may donate land upon condition it revert to him if not used in accordance with certain restrictions which will insure continued recognition of his status as donor. His intent is to donate the land specifically, as restricted, and not its particular equivalent market value.

2. A "defeasible fee" is "[a]n estate in fee that is liable to be defeated by some future contingency . . ." BLACK'S LAW DICTIONARY 506 (rev. 4th ed. 1968). Since any fee liable to be defeated by some future contingency is a "defeasible fee," that term is used hereinafter to denote both fees simple determinable and fees simple subject to a condition subsequent. For the distinction between these two types of defeasible fees compare notes 4 & 5 *infra*.

3. The RESTATEMENT OF PROPERTY (1936) discusses fees simple determinable, fees subject to a condition subsequent, fees simple subject to an executory limitation, fees simple with an executory limitation creating an interest which takes effect at the expiration of a prior interest, and concurrent estates in fee simple defeasible. Published by Villanova University Charles Widger School of Law Digital Repository, 1973

and the language of the conveyance, this Comment will consider only the effect of condemnation upon the fee simple determinable⁴ and the fee subject to a condition subsequent.⁵ The distinction between these two defeasible fees lies in the manner in which the transferor's interest is given effect. If the conveyance created a determinable fee in the transferee and the special limitation in the conveyance is not observed, the estate *automatically* reverts to the transferor or his successor in in-

4. A fee simple determinable is:

An estate . . . created by any limitation which, in an otherwise effective conveyance of land,

(a) creates an estate in fee simple; and

(b) provides that the estate shall *automatically* expire upon the occurrence of a stated event.

RESTATEMENT OF PROPERTY § 44 (1936) (emphasis added). Fees simple determinable are also known as "base fees" or "qualified fees." See BLACK'S LAW DICTIONARY 741 (rev. 4th ed. 1968). Since a determinable fee *automatically* expires upon the occurrence of the special limitation in the conveyance, it is clear that there is some potential estate left with the grantor. "This untransferred potential residuum is a *possibility of reverter* . . . and exists without being created by any specific words in the conveyance." RESTATEMENT OF PROPERTY § 44, comment *a* (1936) (emphasis added).

The special limitation referred to above is defined as follows:

[T]hat part of the language of a conveyance which causes the created interest *automatically* to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest.

Id. § 23 (emphasis added). The following is an illustration of a conveyance which creates in the transferee (*B*) a determinable fee, while leaving the transferor (*A*) with a possibility of reverter.

[*A*], owning Blackacre in fee simple absolute, transfers Blackacre to "[*B*] and his heirs so long as Town [*C*] remains unincorporated."

Id. § 23, illustration 2.

A consolidation of the above mentioned terms and definitions results in the following definition of a determinable fee:

A determinable fee in real property is one subject to a contingency upon the happening of which the fee terminates *ipso facto* and title to the property reverts to the grantor. No notice, declaration of forfeiture or other act of the grantor is required to effect such termination or reversion.

People *ex rel.* Dep't of Pub. Works v. City of Fresno, 210 Cal. App. 2d 500, 504, 26 Cal. Rptr. 853, 855 (1963) (citations omitted).

5. A fee simple subject to a condition subsequent is:

An estate . . . created by any limitation which, in an otherwise effective conveyance of land,

(a) creates an estate in fee simple; and

(b) provides that upon the occurrence of a stated event the conveyer or his successor in interest shall have the power to terminate the estate so created.

RESTATEMENT OF PROPERTY § 45 (1936). Comment *a* to this section of the *Restatement* states that:

When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination . . . has the power to regain his former estate, if and when there is a breach of the condition subsequent.

A condition subsequent, as used in comment *a* above is:

[T]hat part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyer, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.

Id. § 24. The following is an illustration of a conveyance which would create in the transferee (*B*) a fee simple subject to a condition subsequent, while giving the transferor (*A*) a power of termination.

[*A*], owning Blackacre in fee simple absolute, transfers Blackacre to [*B*] "and his heirs but on condition that if liquor is sold upon the premises conveyed, [*B*]'s estate shall be subject to [*A*]'s right to re-enter for breach thereof."

terest.⁶ No affirmative action by the transferor or his successor in interest is required. However, if the conveyance created a conditional fee⁷ in the transferee and the condition subsequent is not observed, it is then necessary for the transferor, or his successor in interest, to take affirmative action in order to regain the estate.⁸ The residuum future interest, which is not conveyed by the transferor of a determinable fee, and by which the property reverts on the happening of a special event, is called a possibility of reverter.⁹ Similarly, the residuum future interest not conveyed by the transferor of a conditional fee, and by which he may affirmatively act to regain his estate, provided the condition subsequent is breached, is called a power of termination.¹⁰

Possibilities of reverter and powers of termination are distinguished in the same manner as the conveyances leading to their creation; a possibility of reverter becomes a possessory interest *automatically* upon failure of the special limitation, while *affirmative action* by the holder of a power of termination is necessary to regain the transferred estate.¹¹

Since both possibilities of reverter and powers of termination are contingent future interests¹² and neither is subject to the rule against perpetuities,¹³ their valuation is difficult.¹⁴ In general, the similarities between the two contingent estates are so strong that courts (and this Comment) treat them together.¹⁵

6. Compare RESTATEMENT OF PROPERTY § 44 with § 45 (1936). See notes 4 & 5 *supra*.

7. In this Comment a fee simple subject to a condition subsequent will be referred to as a conditional fee.

8. See text accompanying note 11 *infra*.

9. L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 13, at 28 (2d ed. 1966). See note 4 *supra*. It is important to note here that possibilities of reverter are not reversions, *e.g.*, the interest that remains in the grantor when he conveys a life estate, because the grantor has conveyed an estate in fee simple which is of the same quantum as that which he had before the conveyance; while in the case of a reversion the transferred estate is less than that the transferor had. *Id.* § 13, at 29. This distinction is significant because it forms the basis upon which some courts found their decisions not to compensate the holder of a possibility of reverter or power of termination when the conveyed estate is taken under eminent domain proceedings. The rationale is that since the transferor gave an estate of the same quantum as that which he possessed, his future interest is not worth anything until the event terminating the estate has occurred. Since the condemnation extinguishes all interests, both possessory and future, there was never any period prior to condemnation within which the estate could have reverted to this holder of the possibility of reverter or power of termination. See text accompanying notes 36-38 *infra*. Conversely, the holder of a reversion is compensated since he never gave up an estate of the same quantum as he possessed, thereby retaining something for which he should be compensated.

10. L. SIMES, *supra* note 9, § 14, at 30.

11. *Id.*

12. *Johnson v. Los Angeles*, 176 Cal. 479, 486, 168 P. 1047, 1049 (1917); L. SIMES, *supra* note 9, § 13, at 29.

13. See note 159 *infra*.

14. The difficulties of evaluating possibilities of reverter and powers of termination stem from two dependent factors. One factor is that the interest is contingent upon the happening of a specific event. It may be that the event will occur through a violation of a condition by the transferee or it may occur because of the act of some third party. The second factor is that the interest can continue on forever and no one can really be sure when the event determining the estate will occur.

15. Browder, *The Condemnation of Future Interests*, 48 VA. L. REV. 461, 472 (1962) (citing cases). But cf. notes 4 & 5 *supra*.

The question of whether or not the holder of a possibility of reverter or a power of termination should be compensated when the property with which the interest is connected is condemned and taken in eminent domain proceedings may arise in a situation similar to the following illustration.

A, wishing to dispose of Blackacre, conveys it to *B*, a church. The conveyance could either provide that if *B* uses the land for other than church purposes, said parcel would immediately revert to *A* or his successors in interest (thus creating a possibility of reverter in *A* or his heirs), or that if the land ceases to be used for church purposes, *A* or his heirs shall have the power to re-enter and terminate *B*'s estate (thus creating a power of termination in *A* or his heirs). While *B* is using Blackacre for church purposes, *C*, the state, condemns the parcel under its eminent domain power in order to build a highway. Thus the land can no longer be used for church purposes.

III. THE OLD VIEW

One of the earliest cases dealing with the value of a possibility of reverter was *Chandler v. Jamaica Pond Aqueduct Corp.*¹⁶ Somewhat unusually,¹⁷ the plaintiff in *Chandler* was not the grantor seeking compensation for his possibility of reverter but rather the owner of the defeasible fee in a condemned parcel of land. The defendant corporation, the condemnor, was the one to raise the question of the reversioner's interest. It argued that the plaintiff owned a portion of the condemned land by a "base"¹⁸ or defeasible fee, and that it was, therefore, entitled to a diminution of the award to the plaintiff. Its rationale was that the estate was less valuable than one with no possibility of reverter.¹⁹ In rejecting the defendant's position, the Supreme Judicial Court of Massachusetts stated:

The grantor has no subsisting title in the land, but only a possibility that it may revert to him by the happening of the event upon which it is determinable. . . . He is not, within the meaning of the act under which these proceedings are instituted, a person or corporation whose land is taken by the respondent. His possibility of interest is *too remote and contingent* to be the subject of an estimate of damages by a jury.²⁰

16. 125 Mass. 544 (1878).

17. The vast majority of cases where one is seeking compensation for condemnation of a future interest involves the situation in which the plaintiff-grantor is the holder of a possibility of reverter or power of termination and is seeking compensation for the loss of that interest upon condemnation. See, e.g., cases cited in notes 40-43 *infra*.

18. The *Chandler* court stated that:

A base or qualified fee is an estate which may continue in one and his heirs forever, but which has a qualification annexed to it, by virtue of which it may be determined when that qualification is at an end.

125 Mass. at 547 (citations omitted). See note 4 *supra*.

19. 125 Mass. at 547.

20. *Id.* (emphasis added).

Thus, the *Chandler* court allowed the holder of the defeasible fee to collect the entire value of the condemned land as if there were no restrictions thereon. Although the *Chandler* decision was based upon statutory interpretation²¹ and although it did not involve the holder of a possibility of reverter as a party, the real import of the case was the concept that the interest of a holder of a possibility of reverter is too remote and contingent to be compensable.

In *Scovill v. McMahon*²² property was conveyed by deed with the express limitation that the land be used only as a burial ground. The city of Waterbury, pursuant to an enabling statute, condemned the land in eminent domain proceedings for use as a park.²³ The heirs of the grantor, having re-entered the land, claimed the condemnation award. In rejecting the heirs' claims, the court held that where a valid act of the legislature "rendered the performance of the act described in the condition subsequent unlawful, the condition of the deed was thereby destroyed, and the title vested absolutely" in the grantee.²⁴ Thus, *Scovill*, unlike *Chandler*,²⁵ took the position that the condition subsequent was discharged by an act of law, thereby preventing any forfeit of the transferee's estate.

The reasoning of the *Scovill* court was more clearly explained in the later case of *Cincinnati v. Babb*.²⁶ There, land was conveyed to a church to be used solely for church purposes. The deed contained a rigid clause of defeasance and reverter if the land were used for other than church purposes.²⁷ A portion of the conveyed land was taken in

21. The condemnor was authorized to condemn by statute. Section 1 of the statute gave the corporation condemning power while section 2 provided that:

[A]ny person . . . injured by the . . . Corporation under the act, may apply for a jury to assess the damages for such taking or injury, by petition to the Superior Court . . . and that, after the petition is duly entered in court, "the cause shall thereupon proceed like other civil causes in said court."

125 Mass. at 546, citing Act of May 8, 1868, ch. 182 [1868] Mass. Acts and Resolves 136-37 (expired 1870). The issue in *Chandler* was whether or not, under this specific statute, evidence of the fact that the plaintiffs held a portion of the condemned land by base fee was admissible by the defendant-condemnor for the purpose of diminishing the damages owed to the plaintiffs. The court found that the legislative intent of the statute in question was that "the same rules should govern as are applied in the assessment of damages in cases of laying out highways." 125 Mass. at 546. Therefore, basing the condemnation statute on this legislative intent, the *Chandler* court found that evidence of the nature of the condemnee's fee was inadmissible.

22. 62 Conn. 378, 26 A. 479 (1892).

23. *Id.* at 386, 26 A. at 480.

24. *Id.* at 390, 26 A. at 481.

25. Both *Scovill* and *Chandler* found that the interest of a holder of a possibility of reverter or of a power of termination was not compensable. However, the results were based upon independent rationales. The *Scovill* court held that since the statute authorizing condemnation made compliance with the condition subsequent unlawful, the condition was destroyed and the grantee retained the fee. In *Chandler*, the court denied compensation to the holder of the contingent future interest on the grounds that his interest was too speculative and remote to be capable of evaluation.

26. 4 Ohio Dec. Reprint 464 (1893).

27. *Id.*

order to widen the street on which the church stood,²⁸ and both the church, as grantee, and the grantor, as holder of a possibility of reverter, claimed the condemnation award. The *Babb* court noted that, historically, a condition contained in a deed could be discharged without defeating the grantee's estate if performance of the condition was prevented by an act of God or of the grantor.²⁹ The court then explained that this same rule applied when performance is rendered impossible because of the actions of a third person whose concurrence is necessary to fulfill the condition.³⁰ By analogy, the *Babb* court concluded that this same rule should apply to acts of law — such as condemnation — which render performance of the condition impossible.³¹

Although the *Babb* court held that the city's taking of the land "[destroyed] the condition *pro tanto*, and not the estate,"³² the award was not directly given to the church, but rather was to be held in trust to be used for church purposes.³³ *Pro tanto* destruction of the condition logically leads to the conclusion reached in *Babb* — that the holder of the possibility of reverter was entitled to no compensation — because, at the time the condition was destroyed, the holder of a possibility of reverter merely had a future interest³⁴ which could not be perfected until the grantee breached the condition.³⁵ Therefore, if the condition were destroyed before it was breached, the holder of the possibility of reverter would lose his future interest.

The concept of *pro tanto* destruction of the condition has been used by some courts³⁶ as a basis for denying relief to holders of possibilities of reverter independent of the act of God analogy. These courts hold that while the condemnor seized the defeasible fee, he also seized the possibility of reverter belonging to the heirs of the grantor. Thus, since there is "no interval of time between the seizure of the [grantee's] estate and the seizure of the rights of the heirs at law during which

28. *Id.*

29. *Id.* at 465.

30. *Id.* at 466.

31. The *Babb* court stated:

An act of law is, as to the involuntary grantee, a *vis major* as much as an act of God, of the grantor, or of a third person, and from the above principles and authorities it would seem to follow that performance of a condition subsequent, prevented by act of law, is excused equally as when defeated by providence or by the grantor.

Id.

32. *Id.*

33. In ordering the proceeds to be held in trust for church purposes, the court stated that, notwithstanding the condition of the deed, the grantor had no legal interest in the enforcement of the trust. In addition, the court held that the grantor had no reversionary interest in the trust money because the condition was "not alive as to it [the money]." *Id.* Compare this result with those of courts applying the *cy-pres* doctrine, discussed in part V *infra*.

34. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1, 17, 281 (2d ed. 1956).

35. *Id.* § 282.

36. See, e.g., *Terminal Coal Co. v. United States*, 172 F.2d 113 (3d Cir. 1949); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132, 123 N.Y.S.2d 1239 (1st Dep. Ct. App. 1954), *aff'd*, 291 N.Y. 322 (1954).

there could have been a reverter of title³⁷ to the grantor, the rights of the grantor, at the moment of condemnation, were mere possibilities not capable of valuation.³⁸ Therefore, at the time of condemnation, the estate never reverted. Instead, the only thing of value was the estate of the grantee, who should therefore receive the condemnation award.

The view espoused by these cases is that the holder of a possibility of reverter or power of termination should receive none of the condemnation award. Considered by some to be the majority view,³⁹ this old view has been justified by any one or more of the following rationales: (1) a possibility of reverter or power of termination is not capable of evaluation;⁴⁰ (2) the condition is destroyed by operation of law but the estate is not;⁴¹ (3) a possibility of reverter or power of termination is too speculative and contingent to be compensable;⁴² and (4) there was no interval of time between the taking of the grantee's estate and the grantor's interest during which the estate could have reverted.⁴³

In a sale situation, the first rationale, that the contingent future interest is incapable of evaluation, is obviously not viable. A seller may have expressly accepted a diminished consideration for his property because the buyer insisted that the real estate was less valuable with the restriction.⁴⁴ It is suggested that this diminution is the value of the seller's future interest.⁴⁵ Even if there is no outward manifesta-

37. *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 295, 206 N.Y.S. 132, 133, *appeal dismissed*, 239 N.Y. 625, 147 N.E. 222 (1924).

38. *Id.* It should be obvious at this point that all of the reasons used to deny compensation to the holders of contingent future interests are interrelated. For example, the fact that there is no interval of time between the seizure of the grantee's estate and the seizure of the rights of the grantor's heirs leads to the conclusion that nothing of the grantor's was actually taken. Additionally, since the grantor's rights had not been perfected, they were, at the moment of taking, mere possibilities. Therefore, since these rights were mere possibilities, they are not capable of valuation by a jury.

39. See Comment, *The Effect of Condemnation Proceedings Upon Possibilities of Reverter and Powers of Termination*, 38 U. DET. L.J. 46 (1960).

40. See *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132, *appeal dismissed*, 239 N.Y. 625, 147 N.E. 222 (1924); *Lyford v. City of Laconia*, 75 N.H. 220, 72 A. 1085 (1909).

41. See *Woodville v. United States*, 152 F.2d 735 (10th Cir. 1946); *Puerto Rico v. United States*, 132 F.2d 220 (1st Cir. 1942), *cert. denied*, 319 U.S. 752 (1943); *United States v. 1846.77 Acres of Land*, 48 F. Supp. 721 (W.D. Ky. 1942); *Scovill v. McMahon*, 62 Conn. 378, 26 A. 479 (1892); *Cincinnati v. Babb*, 4 Ohio Dec. Reprint 464 (1893).

42. See *United States v. 53¼ Acres of Land*, 139 F.2d 244 (2d Cir. 1943); *Fifer v. Allen*, 228 Ill. 507, 81 N.E. 1105 (1907); *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544 (1878); *Lyford v. City of Laconia*, 75 N.H. 220, 72 A. 1085 (1909); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132, *appeal dismissed*, 239 N.Y. 625, 147 N.E. 222 (1924); *Cincinnati v. Babb*, 4 Ohio Dec. Reprint 464 (1893).

43. See cases cited in note 36 *supra*.

44. It is evident that a parcel of land is more valuable when there are no restrictions as to use. This is because, subsequent to the time of transfer, the use that would result in the highest sale price might be that which is expressly forbidden by the conveyance.

45. See 46 CORNELL L.Q. 631, 636 (1961) where it is suggested that:

[I]f the owner of the defeasible fee gave consideration for the land in the purchase, the value of the land would be the value of the land with the restriction. *See also* *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544 (1878).

tion of an intention to pay or accept a diminished consideration, such may be inferred since both buyer and seller are certainly aware that land subject to a restriction on use is less valuable than the same land with no restriction. This inference would be especially valid if the buyer purchased the land with a view toward resale at some future date.⁴⁶ Where diminished consideration is inferred, valuation of the future interest would be "that fraction of the condemnation award representing the difference between the market value of the land at the time of the original transaction and the consideration given for the determinable fee. . . ."⁴⁷ It has been suggested that a jury should evaluate and weigh the proportionate interests in the condemned property.⁴⁸ The jury could consider, among other factors applicable to a specific situation, such things as the imminence of the terminating event, the consideration paid in the original transaction, and any manifested intentions of the grantor.⁴⁹ Although valuation may be difficult, such difficulty should not, it is submitted, be a basis for denying relief.

The fact that a donation rather than a sale is involved does not alter the conclusion that difficulty of valuation is not a viable basis for denying relief. In the donation situation, the measure of the award which the transferor should receive should also be measured by the difference between the fair market value of the land with the restriction and the fair market value of the land without the restriction. That amount would represent the value of that portion of the fee not transferred by the transferor.⁵⁰

The second rationale for denying compensation to holders of contingent future interests — that impossibility excuses performance of a condition subsequent or of a special limitation — is, it is submitted, unjustified where the impossibility is due to eminent domain proceedings. While a number of cases involving land conveyed by will seem to support the rule that impossibility excuses performance of a condition subsequent,⁵¹ analysis of those cases suggests that "even though the courts may not emphasize it, they are in truth merely construing the will to determine what the testator would have desired had he anti-

difference between the market value of the land at the time of the original transaction and the consideration given for the determinable fee, would provide adequate compensation for the holder of the possibility of reverter.

A similar valuation could be made when land is donated rather than sold. However, since no consideration passes, the value of the grantor's interest would be the difference between the market value of the land at the time of conveyance with the restriction and the market value of the land at the time of conveyance without any restriction.

46. Real estate investors are more astute in matters of quality of title and therefore realize, when purchasing for resale, that an interest less than fee simple absolute is not as valuable; accordingly, they pay less for a conditional fee. Clearly, there is no need for two sophisticated real estate dealers to discuss this matter expressly.

47. 46 CORNELL L.Q. 631, 636 (1961).

48. *Id.* at 631-32.

49. *Id.* at 632.

50. See note 45 *supra*.

51. See cases cited in L. SIMES & A. SMITH, *supra* note 34, § 2013.

cipated the impossibility."⁵² Since conveyances creating defeasible fees contemplate possible breach of the limitation on use by their very nature, it is suggested that courts should apply the same rule as applied with testamentary devises and enforce the intent of the grantor. If such a rule were followed, the entire condemnation award would go to the holder of the future interest because the grantor's intent is clearly expressed in the conveyance. Language such as "if used for other than church purposes said parcel shall revert to the grantor" manifestly indicates the grantor's intention to regain possession if the conveyed land is used for purposes other than that specified in the deed and, presumably, to receive any benefits from it.

The impossibility rationale might also support the division of the condemnation award. When land is devised to a person in fee simple defeasible and an intervening act of God or law makes performance of the condition impossible, the court has two alternatives; either give the grantee the land in fee simple absolute, or give the land to the grantor.⁵³ However, when land is taken by eminent domain proceedings, there is a monetary award which, unlike the unique indivisible parcel of land, *can* be divided.⁵⁴

The third rationale for denying compensation to a holder of a possibility of reverter or power of termination is also fallacious. To deny compensation on the premise that the contingent future interest is too speculative and contingent to be compensable, denies by implication that these interests are property rights.⁵⁵ The conclusion that these *are* property rights is compelled, however, by several lines of reasoning.

First, consider the traditional reason for denying that contingent future interests are property rights — just compensation for the taking of private property is, under constitutional mandate,⁵⁶ the equivalent of its market value, but the possibility that the title to a parcel of land may, at some undetermined time in the future, revert to the grantor is too nebulous to have any legally estimable market value.⁵⁷ This conclusion would be justified only if the value of a contingent future interest were unestimable. However, as indicated earlier, valuation of contingent future interests is not impossible. Moreover, a recent court decision⁵⁸ has held that it is immaterial whether a future interest

52. *Id.* § 2013, at 286.

53. *Id.* § 2013, at 290.

54. *Id.* § 2013, at 291.

55. The great weight of authority does not recognize contingent future interests as "property" in the constitutional sense. *See, e.g.,* discussion in *State v. Independent School Dist.*, 266 Minn. 85, 123 N.W.2d 121 (1963); 2 J. SACKMAN & P. ROHAN, *NICHOLS' THE LAW OF EMINENT DOMAIN* § 5.221[1] (3d ed. 1970). *But see* note 62 *infra*.

56. *See* note 67 *infra*.

57. *People ex rel. Dep't of Pub. Works v. City of Fresno*, 210 Cal. App. 2d 500, 515, 26 Cal. Rptr. 853, 862 (Dist. Ct. App. 1963).

58. *Hemphill v. Mississippi State Highway Comm'n*, 245 Miss. 33, 145 So. 2d 455 (1962).

is vested or not; the owner of that future interest must have his "day in court," or its equivalent, before a claim affecting [that interest] can effectively secure judicial sanction."⁵⁹ While that court based its conclusion on due process grounds rather than on the requirement of just compensation,⁶⁰ it stated, convincingly, that any interest which takes away from the sum total of rights which go to make up a fee simple absolute is an existing interest.⁶¹

Second, distinguished commentators have taken the position that unvested contingent future interests may be more substantial and more likely to take effect than some future interests which are vested subject to be divested.⁶² Third, the fact that future interests, including

59. *Id.* at 46, 145 So. 2d at 461. Moreover, the *Hemphill* court stated that:

Reasons given by the courts for denial of recovery for the taking of future interests are unconvincing. It has been said they are not estates in land but only possibilities that can be ignored. The cases and statutes deny this. It is said that performance of a condition subsequent is rendered impossible by condemnation and is therefore void. Yet the taking by the state is the act which often creates the impossibility. And it is usually stated that a future interest is so remote, speculative, or contingent that it is impossible to estimate its value. This indicates the main problem. The interest must be capable of present evaluation. This is a question of fact for the trial court, after hearing evidence on that issue. The courts use a variety of valuation methods in making awards for other condemned interests which have been classified as compensable. . . . Moreover, contingent remainders and executory interests have been given constitutional protection in other respects.

Id. at 50-51, 145 So. 2d at 463 (citations omitted).

60. *Id.* at 46, 145 So. 2d at 461. The due process and just compensation arguments are necessarily intertwined because the failure to provide due process is related to some action taken by a governmental unit. In the *Hemphill* case the governmental action, in which the individual had to be afforded due process, was the taking of a future interest without just compensation.

61. *Id.*

62. L. SIMES & A. SMITH, note 34 *supra*, § 136. Section 136 provides:

It is frequently said that "vested rights" are the subject of the protection of the constitutional guarantees, such as the due process clause of Federal and State Constitutions and the clause prohibiting the taking of private property for public use without compensation. Doubtless the term "vested" when so used begs the question, since it is assumed that it has already been determined that the right in question will be protected. It seems clear, therefore, that the term, if used at all in connection with constitutional questions, should not be regarded as synonymous with the same expression when used in the law of real property. In other words, there is no rule to the effect that a vested remainder is protected under Federal and State Constitutions but a contingent remainder is not. Indeed, it would be most unfortunate if such were the law; for many contingent future interests are of far more substantial character and more likely to take effect in possession than some future interests which are vested subject to be divested. . . . The contingent interest, though perhaps not an estate, has achieved status as a protectable interest for many purposes. Doubtless the so-called future interest given to unborn persons, or the bare expectancy of an heir apparent are extremely tenuous interests so far as present legal relations are concerned. But to leap to the conclusion that because some contingent interests are too tenuous to bear the label of "property" that therefore all contingent interests are not "property" is totally unwarranted. When a contingent remainder is limited to an existing ascertained person there is no question but that the courts will recognize the interest as having present existence. The wide acceptance of that fact makes it clear that the interest is "property" in the usual sense of the word. Whether a given future interest is of a sufficiently substantial character to be given the protection of a particular constitutional guaranty would seem properly to depend upon factors other than the classification as vested or contingent.

possibilities of reverter and powers of termination, are estates in land⁶³ and are, in most jurisdictions, alienable,⁶⁴ supports the hypothesis that contingent future interests are property rights in the constitutional sense.

The above considerations — the fact that possibilities of reverter and powers of termination are estates in land, alienable in most jurisdictions, and that contingent future interests are not difficult to evaluate — suggest that contingent future interests are “property” in the constitutional sense.⁶⁵ The conclusion has been succinctly stated as follows: “If I have an interest which I can sell, I have an interest for which I ought to be paid cash upon condemnation.”⁶⁶

Once it is recognized that contingent future interests are indeed property rights, then any taking of these rights must be compensated in order to fulfill state and federal constitutional requirements of just compensation.⁶⁷ The fact that these property rights may be perfected⁶⁸

63. Estate means “an interest in land which (a) is or may become possessory; and (b) is ownership measured in terms of duration.” RESTATEMENT OF PROPERTY § 9 (1936).

64. In *L. SIMES & A. SMITH* *supra* note 34, the authors note that the older view against alienability was that one could not transfer an interest which was not the subject of present ownership. The authors reject that position and note that:

The eradication of this idea from legal thinking will be a valuable step toward a rational treatment of the subject of alienability. In the first place, the idea has been thoroughly discredited by the great bulk of modern authority in which contingent remainders, executory interests, and *possibilities of reverter* have all been endowed with the quality of alienability and have been recognized for other purposes as being the subject of present ownership.

Id. § 1852, at 156 (emphasis added).

Additionally, the authors note that there is a very strong public policy argument in favor of alienability. Such an argument considers:

[That] one should be permitted to realize on whatever he has which is of economic value; that the tendency to “cash in” on future possibilities, to “sell short,” as it were, is part of the fabric of modern life; and that it is futile for the law to attempt to stop it.

Id. § 1852, at 157–58. Most important, however, is the fact that in every state there is some method by which all future interests may be transferred. *Id.* § 1852, at 158. Comparing this fact against the older rule prohibiting alienability of future interests, the authors reach the following conclusion:

It seems irrational to close the front door by denying that contingent future interests can be transferred in the ordinary way in which other interests in land are conveyed, while leaving open the back door, available only to those who are particularly skilled in the technicalities of estoppel and equitable transfers.

Id. § 1852, at 158 (footnote omitted). Compare RESTATEMENT OF PROPERTY §§ 159 to 161 (1936).

65. *But see* *Patrick v. Mississippi State Highway Comm'n*, 184 So. 2d 850 (Miss. 1966).

66. Browder, *The Condemnation of Future Interests*, 48 VA. L. REV. 461 (1962). The author there noted that:

[F]uture estates are future in certain significant respects, but are also *present segments of the totality of ownership*, whose substantiality, or present reality, may be found in the ever widening attribute of alienability.

Id. at 462 (emphasis added).

67. See, e.g., U.S. CONST. amend. V:

[N]or shall private property be taken for public use, without just compensation. and PA. CONST. art. 1, § 10:

[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

at some future date may tend to diminish their value; however, their contingency alone should not preclude compensation, especially when the possibility of reverter is conceivably substantially more valuable than the defeasible fee itself. Such might be the case in a situation in which a grantor conveys land situated in the center of a city to the city on condition it be used only as a park. In such a situation the land so restricted would be of very little value to the city monetarily. In fact, since the specific use would generate no revenue while requiring expenditures for maintenance, continued restricted use of the land would effectively result in a monetary loss. The only estimable value that such land would possess would be its value as a potential building site. However, the right so to use the land was expressly retained by the grantor when he conveyed the land in fee simple defeasible; he manifested an intention to allow the city to use the land so long as it did not capitalize on its true potential value. Hence, the value of the possibility of reverter might be the real market value of the property when put to its best use,⁶⁹ while the value of the defeasible fee may be measured only by the enjoyment it gives the city's citizens and the goodwill generated by its restricted use, incidents of its existence that are hardly of readily ascertainable value. It is submitted that in such a situation the real interest condemned, and the one for which there should be compensation, is the possibility of reverter. Notwithstanding the above reasoning, at least one court,⁷⁰ although accepting the fact that a possibility of reverter was a property right, nevertheless held that since the contingent future interest was of such a nebulous nature, it had no legally estimable market value; therefore, the possibility of

69. The value of the possibility of reverter referred to in the text is the market value of the possibility of reverter once the limiting condition has been breached.

70. In *People ex rel. Dep't of Pub. Works v. City of Fresno*, 210 Cal. App. 2d 500, 26 Cal. Rptr. 853 (Dist. Ct. App. 1963), the grantors donated a parcel of land to the city for use as an airport. Thirty years later the state condemned two acres of the airport land for highway purposes, and both the city and the grantor's heirs, as holders of a possibility of reverter, were named as defendants. The trial court found that the city's estate had been terminated, and awarded the entire condemnation award to the heirs. Upon the city's appeal, the heirs argued that compensation is paid for future and not for past interests in property and that they were the owners of the only future interest in the property, because upon termination of the city's interest therein title would revert to them. The court rejected this proposition, noting that:

This contention fails to distinguish between a voluntary nonuse of property for a specific purpose by the owner of a determinable fee, and the involuntary nonuse thereof effected by its taking through condemnation which prevents further use for any purpose by *either the owner of the determinable fee or the owner of the reversionary interest . . . and further fails to take into consideration the fact that the taking of the property in question terminated not only the reversionary owner's future possible use thereof but also the city's future actual use.*

Id. at 509, 26 Cal. Rptr. at 858 (citations omitted) (emphasis added). As to appellees' contention that the taking of their possibility of reverter violated a state constitutional mandate of just compensation, the court stated:

[T]he interest of the . . . heirs in the property taken, the possibility that the title thereto might revert to them at some unforecastable time in the future, *was of such a nebulous nature that it had no legally estimable market value.*

Id. at 516, 26 Cal. Rptr. at 862 (emphasis added).

reverter could be taken without compensation⁷¹ without violating state constitutional provisions.⁷²

The fourth rationale for denying compensation to holders of contingent future interests — that there was no period in which the estate reverted to the transferor — is dependent on the position that the interest is too speculative and contingent to be compensable.⁷³ If the argument against that position is accepted, then there is no support for this last rationale.⁷⁴

The old view appears harsh, especially where the transfer was by donation rather than sale. The view would give the donee a windfall of an especially sweet nature. He would receive the value, not only of what he had gratuitously received (the defeasible fee), but also the value of that expressly withheld from him (the fee simple absolute). Conversely, the donor arguably had no intention of parting with even a part of the value of his land unless he could maintain his contingent future interest in order to enforce the particular use he contemplated.

Some courts have attempted to avoid the particularly harsh result in the donation situation by finding that the donation was a charitable gift, hence allowing the *cy-pres* doctrine to apply to the condemnation award.⁷⁵ It is suggested that the result of these attempts has been the finding by the courts of charitable gifts where in reality there were none.

In conclusion, it is evident that the old view is not at all satisfactory. It is suggested that, since it represents a harsh rule based on irrational and faulty premises, it should be abandoned in favor of a more equitable rule which recognizes the property interests of holders of contingent future interests.

IV. THE ILLUSORY VIEW

Some commentators believe that, in a situation similar to that posed by the introductory hypothetical, the holder of the defeasible fee should receive the entire award.⁷⁶ There is some degree of unanimity among

71. *Id.*

72. The relevant provision was:

Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner.

CAL. CONST. art. 1, § 14.

73. If there is a period during which the estate could revert, it would do so; once having reverted, the future interest holder would have a compensable interest. Therefore, since there is no period during which the estate could revert, the contingent future interest is necessarily speculative and contingent.

74. If the future interest is estimable, as was suggested in the text accompanying notes 44-46 *supra*, then it makes no difference whether the fee reverts or not because the future interest holder can be compensated for the value of his future interest and not the land. The result is that the last reason for denying compensation to holders of contingent future interests is merely a conceptual technicality of little merit.

75. See text accompanying notes 100-107 *infra*. See also *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132, *appeal dismissed*, 239 N.Y. 625, 147 N.E. 222 (1924).

76. See, e.g., Comment, *supra* note 39.

them in that they all cite the Pennsylvania case of *Lancaster School District v. Lancaster County*⁷⁷ as authority for that position. There, land was conveyed to the county to:

[H]old the same for the use of the directors of the . . . [school district], so long as the building erected on said lot of ground shall be used by the said directors for the purposes of education, and when the same shall cease to be so used, the said lot of ground and buildings thereon erected, shall be vested in the commissioners of the county of Lancaster, for the use of the said county.⁷⁸

There was no provision of reversion, and consideration was paid to the transferor by the county. The county therefore, clearly purchased the entire fee. While the land was still being used for school purposes the United States condemned it and the award was given to the County.⁷⁹ Ten years later the school district claimed that it had legal title to the land at the time of condemnation and instituted a suit to recover the award, citing *Scovill* in support of its position.⁸⁰ In a confusing opinion⁸¹ the *Lancaster* court rejected the school district's position. The end of the opinion seems to say that when the federal government condemned the land, the "conditional" estate of the school district ended and reverted back to the county. The court found that because of this reversion, the county should receive the condemnation award. Thus, the case came to stand for the proposition that the holder of a possibility of reverter receives the entire award.⁸² However, analysis of the opinion reveals that the court found that the school board had no title at all.⁸³ Since the school board was not the owner of a defeasible fee, the case should not stand for the proposition for which it has been cited. This fallacious interpretation of *Lancaster* was later rejected by the Third Circuit in *Terminal Coal Co. v. United States*.⁸⁴ In that case, a transferor had conveyed a right of way to the Pittsburgh Southern Railway Company which was to continue as long as the land was used or required for railroad purposes. The land in question was utilized in accordance with the deed until condemnation proceedings began.⁸⁵ The

77. 295 Pa. 112, 144 A. 901 (1929).

78. *Id.* at 116-17, 144 A. at 902-03.

79. *Id.* at 117, 144 A. at 903.

80. *Id.* at 114. This point was not reported in the *Atlantic Reporter*.

81. The confusing nature of the *Lancaster* opinion is best illustrated by the case of *Puerto Rico v. United States*, 132 F.2d 220 (1st Cir.), *cert. denied*, 319 U.S. 752 (1942). In that case, the circuit court admitted that the meaning of *Lancaster* was unclear, and accordingly rejected it. *Id.* at 222.

82. *Cf.* Comment, *supra* note 39.

83. Although the county purchased a *fee simple absolute*, it allowed the school district to continue using the parcel for educational purposes. Therefore, the school district had what may be loosely considered a conditional estate. The true relationship between the county and the school district was that the county, as fee owner, was merely allowing the school district to utilize the land as long as they did so for educational purposes. *Cf.* text accompanying note 78 *supra*.

84. 172 F.2d 113 (3d Cir. 1949).

85. *Id.* at 114.

award was given to the railroad, and the transferor, holder of the possibility of reverter, appealed, basing his argument upon the *Lancaster* case.⁸⁶ The court in *Terminal* prefaced its opinion by stating that:

[The issue is] whether appellant, as a matter of law, is entitled to recover the fair market value of the land as though the right of way had been abandoned, as of the date of the condemnation.⁸⁷

The court, in denying appellant's claim, interpreted the *Lancaster* case as follows:

From [the Pennsylvania Supreme Court's] opinion, we may fairly conclude that the court viewed the school district as having yielded its equitable rights to the county *and as being like a tenant for a period terminable upon the happening of a contingency* such as the condemnation. Unlike the case at bar, no conveyance had been made to the occupant of the land by the holder of the legal title⁸⁸

Additionally, the *Terminal* court was of the opinion that the issue with which they were faced had never been decided by Pennsylvania courts.⁸⁹

Another significant indication that *Lancaster* does not set forth a view of any merit is that a later Pennsylvania case, without ever mentioning *Lancaster*, adopted the Restatement view discussed below.⁹⁰ In addition, no jurisdiction (including Pennsylvania) has ever really adopted a view in accordance with that for which *Lancaster* is said, by some, to stand.⁹¹

Although there really is, then, no true "*Lancaster* view," the result reached might well be the best. A nonlegal, common sense answer to the introductory hypothetical illustration may be that the contingency having occurred upon which the estate was to have reverted, the holder of the contingent future interest should receive the entire condemnation award. It should, arguably, make no difference whether the happening was the result of a voluntary act of the transferee or of some vis

86. *Id.* at 115.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Chew v. Commonwealth*, 400 Pa. 307, 161 A.2d 621 (1960). In that case the appellant conveyed land to the Philadelphia Western Railway Company. The deed provided that the property would revert to the appellant if the land ceased being used for railway purposes. Prior to the Commonwealth's condemnation, the railroad applied to the Public Utility Commission for permission to abandon its rail service and replace it with bus service. The P.U.C. had not reached a conclusion on the railroad's request at the time condemnation took place. The Pennsylvania Supreme Court held that RESTATEMENT OF PROPERTY § 53, comment c (1936) was applicable since, at the time of eminent domain proceedings, voluntary abandonment of the property was probable. Notably, the court did not mention the *Lancaster* case. This omission leads one to believe that the *Terminal Coal* case (see text accompanying notes 84-89 *supra*) was correct in noting that Pennsylvania had not yet considered the question of who receives a condemnation award when property held by defeasible fee is condemned. If this were not true and the *Lancaster* case was on point, the *Chew* court should have discussed it.

91. See Comment, *supra* note 39, at 51. The author of this Comment has found no case adopting the so-called *Lancaster* view.

major⁹² such as a condemnation. The grantor made no such distinction in the conveyance. His manifested intention was that the land be used for a specific purpose only and the grantee took with the knowledge of such a limitation. There is no reason, save the language in the earlier cases that such future interests are speculative and contingent, which supports the giving of the entire award to the holder of a defeasible fee while allowing nothing to the grantor who attempted to protect his interests by including, in the deed, a strict clause of defeasance and reverter.

The adoption of the "illusory" view of *Lancaster* would: (1) eliminate the problem of evaluating the possibility of reverter; (2) fulfill the intentions of the parties to the original conveyance; (3) eliminate constitutional problems of just compensation for the taking of the grantor's future interest;⁹³ and (4) add certainty to the outcome of cases involving condemnation of defeasible estates. It is suggested that such a view could be adopted in *all* cases where no consideration is given to the transferor, unless it is unequivocally clear that a charitable gift was intended.⁹⁴ If the gift is found to be charitable then the *cy-pres* doctrine could be applied to the award as discussed below. Adoption of the illusory view of *Lancaster* is *not* suggested in any situation in which consideration had been given to the transferor because it would result in a windfall to the transferor — he would be paid twice for the same property. In such a situation the proper measure of damages could be computed as suggested above.⁹⁵

It may be that courts have avoided adopting the illusory view of *Lancaster* because of the element of surprise which generally accompanies condemnation proceedings. The element of surprise may prejudice the transferee. He may have been fully intending to comply with any restrictions in the conveyance, yet his intentions suddenly become rendered immaterial as the land is taken from him against his will. By compensating the holder of the defeasible fee, courts may be attempting to make up for this unexpected loss out of a sense of fairness. The validity of the surprise rationale is substantially weakened, however, when one considers what the holder of a defeasible fee has lost. In the situation where the transferee was given the land, it must be remembered that, although he loses the future use of the land, he has

92. "Vis major" is a term used to describe a loss resulting from a natural cause without the intervention of man. It is a loss which could not have been prevented by the exercise of prudence, diligence or care. BLACK'S LAW DICTIONARY 1743 (rev. 4th ed. 1966). See *Cincinnati v. Babb*, 4 Ohio Dec. Reprint 464 (1893).

93. There would be no just compensation problem vis-a-vis the grantee since the rationale behind the illusory view of *Lancaster* is that the condemnation immediately works a reversion, and, therefore, it is the grantor who should receive the award. Under this view it is not the state action per se which takes the grantee's property interest; it is the restriction in the conveyance which was known by the grantee at the time of conveyance. The grantee has assumed a certain risk, doubtless reflected in the purchase price.

94. See text accompanying notes 100-16 *infra*.

95. See text accompanying notes 44-50 *supra*.

lost nothing, since he paid nothing for that use.⁹⁶ In the situation where the transferee paid for the land, he has lost only what he paid and, as discussed previously,⁹⁷ could, and should, be compensated only therefor. Moreover, it is submitted that the surprise rationale is weak for one additional reason: the unexpected is a portion of everyday life. When the owner of a fee simple absolute has his home condemned to make way for a future highway he receives the fair market value of his home but receives no additional compensation for "surprise." Surely a transferee of a defeasible fee should not receive additional compensation for surprise merely because he held a defeasible fee rather than a fee simple absolute.

In conclusion, the illusory view of *Lancaster* could be adopted as the proper allocation of the condemnation award in situations in which the transferee paid nothing for his defeasible fee. Where the transferee has given consideration for his defeasible fee he should receive a portion of the condemnation award as measured and discussed earlier.⁹⁸

V. THE *Cy-Pres* APPROACH

In order to circumvent the problem of who should receive the condemnation award when a defeasible fee is taken by eminent domain, some courts have found, or assumed, that the conveyance created a charitable trust.⁹⁹ By so finding, these courts have been able to apply the *cy-pres* doctrine to the condemnation award,¹⁰⁰ thus avoiding the problem of compensating the holder of a contingent future interest. This approach is tenable, but only fulfills the intentions of the grantor and grantee when a charitable trust is *in fact* created by the conveyance. The weakness with this position is that courts, because of their apparent unwillingness to decide who should receive the condemnation award, have been eager to find charitable trusts when none may have been intended. In *State v. Cooper*,¹⁰¹ the grantor wished to subdivide a tract of land in order to sell the subdivisions as building lots. He filed a plot

96. Where the transferee has improved the property he will have lost the fair market value of that improvement. In such a situation it is relatively simple to calculate the value of the improvement and compensate the transferee accordingly. Since the value of the improvement will be reflected by a corresponding increase in the condemnation award, paying the transferee out of the award will not affect the sum received by the transferor.

97. See text accompanying notes 44-50 *supra*.

98. See text accompanying notes 44-50 *supra*.

99. Cf., e.g., *State v. Cooper*, 24 N.J. 261, 131 A.2d 756, cert. denied, 355 U.S. 829 (1957); *In re County of Westchester*, 243 App. Div. 706, 277 N.Y.S. 26 (1935) (per curiam); *Hamman v. City of Houston*, 362 S.W.2d 402 (Tex. Civ. App. 1962).

100. When a grantor donates land to a charitable organization and such land is condemned, courts frequently find that the grantor intended to create a charitable trust. Under the *cy-pres* doctrine, courts have the power to order the trust funds (or the condemnation award) applied to a charitable purpose other than that named by the settlor (or grantor). This power is exercised when the accomplishment of the settlor's charitable purpose is impossible, impractical, or inexpedient (as where the trust res is condemned). See G. BOGERT, LAW OF TRUSTS 376 (4th ed. 1963).

101. 134 N.J. 261, 131 A.2d 756, cert. denied, 355 U.S. 829 (1957).

plan on which were all the building lots plus one 2.6 acre section designated as a "public square."¹⁰² All the building lots were sold and the public square was maintained as a park for public use. Subsequently, the state condemned the park in order to build a highway. The *Cooper* court found that the grantor "intended to dedicate the area as a public place for recreation, relaxation and rest."¹⁰³ Based upon this finding, the court applied the *cy-pres* doctrine,¹⁰⁴ stating that:

[I]t is impossible to continue the public square dedicated by [the grantor]; but it is not impossible to approximate fulfillment of his general benevolent intent and the borough has undertaken and should be directed to apply any sum awarded to it in the condemnation proceeding to that end.¹⁰⁵

The difficulty in applying the *cy-pres* approach is in determining whether the grantor did in fact have a "general benevolent intent." In *Cooper*, it is entirely possible that the grantor only dedicated the park area to make his other plots more attractive and hence more saleable. The *Cooper* court itself recognized the fact that the park would "benefit the residents of the community and particularly those who occupied the adjacent and nearby lots which he [the grantor] was in the process of selling."¹⁰⁶ If the *Cooper* court believed a charitable trust was indeed intended by the grantor, then its discussion of the contingent nature of a possibility of reverter would have been mere surplusage. However, it is suggested that the *Cooper* court was trying to rationalize its use of the *cy-pres* doctrine by noting that the outcome would have been the same had *cy-pres* not been invoked. Similarly, in *Hamman v. City of Houston*,¹⁰⁷ the holder of a possibility of reverter sought to obtain the condemnation award from the holder of a defeasible fee which had been conveyed to the city for public park purposes.¹⁰⁸ A portion of the land was taken to construct a highway. The *Hamman* court, after noting that this case was one of first impression in Texas, found that the land was conveyed in fee simple defeasible, and held:

[W]here the grantee does not violate the terms of the trust so as to bring about a reverter, but the trust property is appropriated for other uses under the power of eminent domain, the award of damages resulting from the condemnation is decreed to the grantee to be used for the purposes of the trust.¹⁰⁹

102. *Id.* at 264, 131 A.2d at 757.

103. *Id.* at 266, 131 A.2d at 758.

104. The effect was that the court exercised its *cy-pres* powers and directed that the condemnation award be awarded to the borough, holder of the defeasible fee, with instructions to apply the award to approximate fulfillment of the general benevolent intent of the grantor. *Id.* at 276, 131 A.2d at 764.

105. *Id.* For this discussion, a possible distinction between "general benevolent" intent and "charitable" intent will be disregarded.

106. *Id.* at 266, 131 A.2d at 758 (emphasis added).

107. 362 S.W.2d 402 (Tex. Civ. App. 1962).

108. *Id.* at 403.

109. *Id.* at 405.

As authority for this position the court mistakenly cited cases which stand for the old view discussed earlier,¹¹⁰ as well as cases which stand for the *cy-pres* approach.¹¹¹ Therefore, it is submitted that the *Hamman* court was, like so many other courts, confused as to the view it was adopting.

It may be that a grantor, by including a strict clause of defeasance and reverter in a conveyance, rebuts any inference that he intended a charitable gift. Such a conclusion would be particularly appropriate where the land in question was conveyed in connection with the sale of other property, as in *Cooper*. It is suggested that the grantor, by including a reversionary clause in a conveyance, declares to the world that he does not intend a charitable gift; that he does not have a general benevolent intent; but that he rather wishes the particular parcel of land conveyed to be used for one unique purpose. Additionally, he manifests that if such use ceases he wants the land to revert to him. It is submitted that the inclusion in a conveyance of a clause providing for defeasance and reverter should be construed as a rebuttable presumption that no general benevolent intent was intended. It is also suggested that whenever a transferor receives any benefit from a conveyance, this rebuttable presumption of no charitable intent is strengthened.¹¹²

In summation, the *cy-pres* doctrine is a legitimate means of denying the holder of a contingent future interest compensation. However, great restraint must be exercised to insure that a charitable gift was in fact intended. If, from all the circumstances, including the benefit to the donor and his own testimony as to intent (if he is alive), it is not clear that a general benevolent intent existed, then *cy-pres* should not

110. In support of its conclusion that the condemnation award should be given entirely to the transferee to be used for the purposes of the trust (clearly the *cy-pres* approach because that is the only time a trust is imposed on the transferee's interest), the court cited the following cases: *United States v. 1,119.15 Acres of Land*, 44 F. Supp. 449 (1942); *Romero v. Dep't of Pub. Works*, 17 Cal. 2d 189, 109 P.2d 662 (1941); *State v. Cooper*, 24 N.J. 261, 131 A.2d 756, cert. denied, 355 U.S. 829 (1957); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132, appeal dismissed, 239 N.Y. 625, 147 N.E. 222 (1924). The uncertainty of the *Hamman* court is evident. It may be noted that there is no mention anywhere in *Croswell* of any trust; *Croswell* stands solely for the position discussed herein under the title "Old View." Likewise, the court in *United States v. 1,119.15 Acres of Land* adopted the Restatement view — again there was no finding of a charitable trust.

111. The only case cited by the *Hamman* court which correctly supported the decision was *State v. Cooper*, 24 N.J. 261, 131 A.2d 756, cert. denied, 355 U.S. 829 (1957). See text accompanying notes 101-06 *supra*.

112. As a practical matter courts may prefer a presumption of general benevolent intent. This preference may be due in part to a determination that the transferor does not really want the property back, but is merely trying to coerce a specific use. In that situation, the *cy-pres* doctrine would properly apply since a general benevolent intent is manifest. However, the addition of a clause providing for strict defeasance and reverter seems to cast doubt on any presumption of general benevolent intent. If a rebuttable presumption of no general benevolent intent were adopted, the charitable organization would be afforded an opportunity to prove such intent. Absent such a showing of proof, the manifest intention of the transferor — that the property revert to him or his heirs — should be recognized. If the transferor is still alive when the transferred property is condemned, his testimony as to intent

be invoked to defeat the future interest holder's property right. To do so would deprive him of "just compensation," thereby violating state and federal constitutional guarantees, and would effectively frustrate the transferor's intent.

VI. THE RESTATEMENT VIEW

The Restatement¹¹³ view was intended to mitigate the harshness of the old view,¹¹⁴ which gave full compensation to the transferee. Section 53 of the *Restatement of Property* provides that:

The liability of an owner of an estate in fee simple defeasible to have his interest taken under eminent domain proceedings is identical with that of an owner of a [*sic*] estate in fee simple absolute.¹¹⁵

Additionally, the comments to that section note that when ownership in land is divided between a holder of a future interest and a holder of a defeasible fee, a purchaser of an estate in fee simple absolute therein must deal with *two* sellers.¹¹⁶ As to the appropriateness of dividing a condemnation award between the holder of a defeasible fee and a holder of a future interest, the comments state that the total condemnation award, which should not exceed the value of the land in fee simple absolute, should be divided among *persons having interests* in the condemned land.¹¹⁷ Section 53, when read with the comments supports the conclusion that holders of contingent future interests have compensable property interests.

The Restatement recognizes contingent future interests as property rights and attempts to articulate the circumstances under which such interests are compensable. Comment *b* to section 53 provides:

[I]f . . . the event upon which a possessory estate in fee simple defeasible is to end . . . is not probable . . . the entire amount [of the condemnation award] is awarded to the owner of the estate in fee simple defeasible.¹¹⁸

The probability of the occurrence is viewed from the time of the commencement of the eminent domain proceedings and not from the time the award is to be distributed.¹¹⁹

The court in *United States v. 16 Acres of Land*,¹²⁰ dealt with a situation in which land was devised to a town to be used only as a park. The will provided that if the land were used for any other purpose, it

113. As used in this Comment, "Restatement" refers to the RESTATEMENT OF PROPERTY (1936).

114. Cf. *State v. Independent School Dist.*, 266 Minn. 85, 123 N.W.2d 121 (1963).

115. RESTATEMENT OF PROPERTY § 53 (1936) [hereinafter cited as RESTATEMENT].

116. *Id.* § 53, comment *a*.

117. *Id.*

118. *Id.* § 53, comment *b*.

119. *Id.*

120. 474 F. Supp. 603 (D. Mass. 1942).

21

Comment *c* to section 53 of the Restatement is the converse of comment *b* and states that if the event upon which a possessory estate in fee simple defeasible is to end is *probable*, then the award should be divided "between the owner of the estate in fee simple defeasible and the owner of the future interest in such shares as fairly represent the proportionate value of the present defeasible possessory estate and of the future interest."¹²⁸ Applying that standard, the court in *Chew v. Commonwealth*,¹²⁹ dealing with a situation in which land had been conveyed to a railroad to be used solely for railroad purposes and the railroad later applied to the public utilities commission for permission to abandon the line utilizing the land, found that a voluntary abandonment was probable and awarded the damages to the holder of the possibility of reverter.¹³⁰

Although comment *c* seems to serve the purpose of the Restatement — to protect the interests of holders of contingent future interests — there have been only two cases in which the happening of the event upon which the defeasible fee was to revert was found to be imminent.¹³¹ It is suggested that the approach of comment *c* does not adequately protect the rights of a holder of a contingent future interest. Even cases adopting the old view might have compensated the holder of a possibility of reverter had the facts been as they were in *Chew*. It is submitted that the Restatement did not, in practical effect, change the law existing before its inception; therefore, it does not fulfill its intended purpose of more adequately protecting the rights of holders of future interests.¹³²

(W.D. Ark. 1942); *Chew v. Commonwealth*, 400 Pa. 307, 161 A.2d 621 (1960). For a discussion of these cases, see notes 129 & 131 and accompanying text *infra*.

128. RESTATEMENT § 53, comment *c*.

129. 400 Pa. 307, 161 A.2d 621 (1960).

130. *Id.* at 313-14, 161 A.2d at 624-25.

131. In *United States v. 2184.81 Acres of Land*, 45 F. Supp. 681 (W.D. Ark. 1942), land was conveyed pursuant to a restriction that it was to be used for school purposes. The holder of the possibility of reverter, from time to time, informed the director of the school district owning the defeasible fee, that the property would revert to him in the event that the property ceased being used for school purposes. Shortly before condemnation proceedings were begun by the United States, a vote of the electorate of the school district determined that the property would no longer be used for school purposes. The court adopted the Restatement view, stating:

The authorities are quite generally agreed that if, at the time of the taking, the event upon which the property is to revert is imminent, and its occurrence within a reasonable short time is probable, the compensation is to be divided between the owner of the estate in fee simple defeasible and the owner of the future interest in accordance with their respective interests.

Id. at 684. The court held that abandonment was imminent and hence divided the award. *Id.*

The second case holding that abandonment was imminent was *Chew v. Commonwealth*, 400 Pa. 307, 161 A.2d 621 (1960). See text accompanying notes 135 & 136 *supra*.

132. It may be noted that the Restatement may have contributed by providing a more identifiable rationale — that of imminence — as the basis for results similar to the older cases. In *State v. Independent School Dist.*, 266 Minn. 85, 123 N.W.2d 121 (1963), the court gave a well developed explanation of the shortcomings of the Restatement position. The court stated:

It is our belief . . . that the owner of the future interest is not adequately protected by the Restatement rule which permits acquisition of [that] interest

Moreover, one can conclude, by comparing comments *a* and *b* of section 53, that the Restatement view, in its totality, is anomalous. Comment *a* expressly recognizes that a possibility of reverter is a property right and that a holder thereof possesses a compensable interest. Comment *b* then denies compensation for this future interest if the terminating event is not probable. The obvious answer to this incongruity is that comment *b* attempts to define the property rights that are compensable under comment *a*. The difficulty one has in accepting that answer is that, once an interest is defined as a property right, constitutional provisions compel compensation. Therefore, the constitutionality of the view expressed in comment *b*, when considered in light of comment *a*'s recognition of a possibility of reverter as a property right, is tenuous at best.

Additionally, the Restatement view fails to consider such factors as the transferor's intent and the presence or absence of consideration. The exclusion of these factors may lead, as previously discussed, to windfalls to the transferee or transferor.¹³³

Finally, it is important to note that courts have differed in the application of the Restatement view.¹³⁴ Many courts purportedly adopting the Restatement view award at least nominal damages to the holder of the contingent future interest, notwithstanding comment *b*.¹³⁵ Although the argument can be made that the awarding of nominal damages, by those courts, is an easing of the harshness of the old view and, therefore, achieves, and is based upon the Restatement's purpose, such an argument is unpersuasive since (1) even courts adopting the old view awarded nominal damages to the holders of contingent future interests,¹³⁶ and (2) the language of the Restatement makes no provision for nominal damages.¹³⁷ The conclusion, therefore, is that the awarding of nominal

in condemnation proceedings without compensation except in cases where the event determining the fee is imminent. The constitution of Minnesota provides that property shall not be taken for public purposes without just compensation. The owner of a possibility of reverter has an alienable interest in real estate. In all cases, therefore, some amount, however nominal, should be allowed to the owner of a possibility of reverter when his interest is extinguished by condemnation. *Id.* at 95-96, 123 N.W.2d at 129 (footnotes omitted).

133. See text accompanying notes 74 & 75 and 96 & 97 *supra*.

One should also note that, by recognizing that the proportionate values of the defeasible fee and future interest may be evaluated, the Restatement refutes the premise that it is impossible to evaluate a future interest.

134. Compare, e.g., *United States v. 2086 Acres of Land*, 46 F. Supp. 411, 413 (W.D.S.C. 1942) (heirs of the grantor have no valid claim to any portion of the condemnation award) with *Midwestern Devs., Inc. v. City of Tulsa*, 374 F.2d 683, 688 (10th Cir. 1967) (the holder of a right of re-entry or power of termination is entitled to nominal damages).

135. See, e.g., *Midwestern Devs., Inc. v. City of Tulsa*, 374 F.2d 683, 688 (10th Cir. 1967).

136. See, e.g., *Woodville v. United States*, 152 F.2d 735, 739 (10th Cir.), cert. denied, 328 U.S. 842 (1946). There, the performance of a condition in the deed was made impossible by operation of law, compliance therewith was excused, and no forfeiture resulted. However, the holder of the future interest was entitled to nominal damages.

damages is a court-made rule carried over from older decisions rather than the result of the Restatement.¹³⁸

In conclusion, it appears clear that the Restatement does not adequately protect future interest holders when the determining event is not probable. Additionally, the Restatement offers no assistance in determining the value of the future interest when compensation is proper under comment c.

VII. RECENT DECISIONS

A survey of the more recent decisions dealing with compensation to holders of contingent future interests reveals both encouraging departures from the older views and discouraging adherence to antiquated and dogmatic positions.

A 1960 case, *People v. City of Los Angeles*,¹³⁹ involved a suit by the State of California against the city of Los Angeles, the grantee, and the son of the grantor of a parcel of land, in order to condemn their respective interests therein. The land was sought by the state in order to construct a highway. The city was awarded \$3.75 million, while the grantor's son was awarded nothing.¹⁴⁰ Upon appeal, the court denied recovery to the grantor's son, the holder of a power of termination, and stated that:

Any reversionary right appellant may have had under the . . . deed was extinguished at the time the State condemned the interest of the city, for the seizure was of the entire title by the single act of appropriation. At that moment there had been no disuse and the estate being enjoyed by the city might otherwise have continued forever. The right of the appellant was remote, speculative and a mere possibility of no value capable of estimate.¹⁴¹

That court, thus, adopted the old view.¹⁴² As late as 1963, another California court embraced the same view but mentioned the Restatement as well.¹⁴³ It appears, therefore, that California is currently among those jurisdictions which base their decisions on a combination of the old and Restatement views.

138. At least one court has said that even if the determining event is not probable, but the land does have some special value to the holder of the future interest (*e.g.*, where the underlying land is shown to be mineral-bearing or otherwise of value separately from the use of the surface), a court should take notice of that value when considering the award of damages. *Romero v. Department of Pub. Works*, 17 Cal. 2d 189, 195, 109 P.2d 662, 665 (1941).

139. 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (Dist. Ct. App.), *appeal dismissed sub. nom.* Griffith v. California, 364 U.S. 476 (1960) (lack of substantial federal question).

140. *Id.* at 562, 4 Cal. Rptr. at 534.

141. *Id.* at 575, 4 Cal. Rptr. at 542 (citations omitted).

142. Although adopting the old view, the *Los Angeles* court hinted that had the appellant offered proof of the value of his future interest, some compensation might have been proper. *Id.* at 574, 4 Cal. Rptr. at 542.

143. *People ex. rel. Dep't of Pub. Works v. City of Fresno*, 210 Cal. App. 2d 500, 516, 26 Cal. Rptr. 853, 862 (Dist. Ct. App. 1963).

In 1965 a Nebraska court surprisingly added a fifth reason¹⁴⁴ for denying compensation to the holders of contingent future interests. In *McArdle v. School District*,¹⁴⁵ the court was faced with a situation in which land had been conveyed to the school district for as long as the school district did not "refuse" or "neglect" to use the land for school purposes. The land was used in accordance with this limitation for 97 years. Since the particular language in the conveyance clearly manifested an intention to defeat the fee only if the misuse was voluntary, the court easily decided that the state action made the conforming use impossible and, therefore, the school district did not "refuse" or "neglect" to use the land as stipulated in the conveyance.¹⁴⁶ It is suggested that language similar to that used in the conveyance in the *McArdle* case clearly allows the award to be given to the holder of the defeasible fee. Such a result would be in harmony with the transferor's intent, a factor which is less clear in other circumstances.¹⁴⁷ If this were as far as the *McArdle* court had gone, the result therein would have been compatible with the view proposed by this Comment. However, the *McArdle* court added a new dimension to the law concerning condemnation of future interests. After holding that the school district did not violate the restrictive use, the court said:

We further find that due to the length of time since the execution of the deed and the changed condition, the reversionary clause in this deed has served its purpose and has become obsolete, and it would be inequitable to enforce it¹⁴⁸. . . .

While an extensive analysis of *McArdle* is beyond the scope of this Comment, it is suggested that the notion that changed conditions may cause obsolescence of a reversionary interest is improper,¹⁴⁹ especially since these types of future interests are exempt from the rule against perpetui-

144. For the other four reasons, see text accompanying notes 40-43 *supra*.

145. 179 Neb. 122, 136 N.W.2d 422 (1965).

146. *Id.* at 131, 136 N.W.2d at 428.

147. When the words "refuse" or "neglect" are used, as in *McArdle*, it is clear that the transferor only intended the property to revert if the specified use is voluntarily abandoned. However, when the language in a conveyance merely states that a reversion shall take place if the land is used for purposes other than X, then it is not clear whether the transferor intended a reversion for any non-use or only for voluntary non-use. Conveyances which clarify this intent as to the voluntariness of the non-use would be useful in this context.

148. 179 Neb. at 131, 136 N.W.2d at 428 (emphasis added).

149. In L. SIMES & A. SMITH, *supra* note 34, the authors note the following: The general theory of the law of future interests is clearly to the effect that the possibility of reverter and the right of entry are not subject to destruction merely because the conditions which prompted their creation have materially changed since the creation. In this respect these legal devices appear to present a marked difference in characteristics from those of equitable servitude. In the absence of a statute limiting their duration, or an expressly stated duration in the creating instrument, they may become effective for an indefinite period after their creation.

Id. § 1992, at 264 (footnotes omitted) (emphasis added). See also §§ 1238, 1239.

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ties.¹⁵⁰ Moreover, the determination of when the restriction became obsolete was made in an apparently arbitrary manner.¹⁵¹ It is suggested that if a grantor designates a specific use for transferred property, it is not for the courts, but for the Legislatures, to say that the restriction has served its purpose.¹⁵²

In *Ink v. City of Canton*,¹⁵³ the grantor conveyed 33½ acres of land to the city of Canton "for the use and purpose of a public park, but for no other use or purpose whatsoever."¹⁵⁴ The deed provided for absolute defeasance and reversion upon any violation of that clause. The city accepted the conveyance and used the land as a public park from 1941 until 1961, at which time the state of Ohio instituted eminent domain proceedings to appropriate a perpetual easement for a highway. The plaintiffs, heirs of the deceased grantor, claimed the condemnation award. The trial court, relying on *Cincinnati v. Babb*, discussed previously,¹⁵⁵ held that:

[Ohio's appropriation] by eminent domain . . . was an act by operation of law and did not cause a forfeiture by the city, but did extinguish any and all reversionary interests and rights of the plaintiffs in and to said land so taken and to the fund arising from the appropriation.¹⁵⁶

The Supreme Court of Ohio reversed the trial court, expressly overruled *Babb*, and stated:

Where property is conveyed in fee with a proviso that it is to be used only for a specific use and that the property shall revert to the grantor if such specific use ceases, it would appear reasonable to conclude that the property would so revert when its appropriation by eminent domain proceedings prevents that specific use. Such a conclusion would appear to be especially reasonable where . . . the grantee paid nothing for what had been conveyed to him.¹⁵⁷

The *Ink* court acknowledged that the weight of authority was contrary to its holding, but remarked that those contrary decisions often resulted

150. The rule against perpetuities provides that a future interest is not valid unless it vests not later than 21 years after some life in being at the creation of the interest. However, possibilities of reverter and powers of termination are not subject to the rule. L. SIMES & A. SMITH, *supra* note 34, §§ 1222 to 1234 & § 1239.

151. In *McArdle*, the land was utilized in compliance with the restriction thereon for a period of 97 years. The court gave no indication of the time at which obsolescence set in. Nor did the court give particular reasons for its decision.

152. Several states have enacted reverter acts which place a maximum time limitation on the effectiveness of certain contingent future interests. See Comment, *Retroactive Termination of Burdens on Land Use*, 65 COLUM. L. REV. 1272, 1278 n.42 (1965).

153. 4 Ohio St. 2d 51, 212 N.E.2d 574 (1965).

154. *Id.* at 52, 212 N.E.2d at 575.

155. See text accompanying notes 26-34 *supra*.

156. 4 Ohio St. 2d at 53, 212 N.E.2d at 576.

157. *Id.* at 54, 212 N.E.2d at 576. Note that this language, seemingly overruling *Babb*, is merely dicta. The qualifications of this statement together with the actual holding of the case are found in the text accompanying notes 173-77 *infra*. Later in the court's opinion *Babb* was expressly overruled. *Id.* at 60, 212 N.E.2d at 580.

in the grantee's obtaining a windfall, not only receiving the value of the property he had received gratuitously, but also the greater value the property would have had absent the restriction thereon.¹⁵⁸ The court intimated that the granting of the total condemnation award to the holder of the defeasible fee might be justified when he had paid full value for it. Otherwise, the grantor would receive a windfall. When, however, the grantee paid nothing for his fee, as the court stated:

[A]t the very least, the amount, if any, by which the value of an unrestricted fee exceeds the value of the restricted fee, is something that should go to the grantor. . . . *That difference certainly represents the value of something which the grantor expressly refrained from conveying to the grantee.*¹⁵⁹

The court next turned its attention to the Restatement view. It indicated that courts following the Restatement view have adhered too literally to its criteria, and have, therefore, not afforded enough protection to the holders of contingent future interests.¹⁶⁰ The *Ink* court concluded that expansion of the Restatement position was in order, especially when the grantee had paid nothing for his interest. The court held that when a portion of the conveyed land is taken, the award should be held in trust for use consistent with the use of the remaining portion.¹⁶¹ If, however, the funds are not used for purposes relating to the restricted use, then the award reverts back to the grantor.¹⁶² Thus the *Ink* court found, contrary to previous cases,¹⁶³ that the grantor held a reversionary interest in a resulting trust. Moreover, it intimated that if all the land were condemned and if the grantee paid nothing for the defeasible fee, the holder of the future interest would receive the total award.¹⁶⁴ If, however, the grantee paid for the fee, the grantor would receive the difference between the restricted and unrestricted values of the property taken.¹⁶⁵ The *Ink* approach thus satisfies the constitutional requirements of "just compensation" to holders of contingent future interests. In addition, the approach, based on the equities of the case, gives a windfall to neither the grantee nor the grantor. The *Ink* holding does not frustrate the transferor's intent as to use. The only problem with the *Ink* approach is that

158. *Id.* at 54, 212 N.E.2d at 577.

159. *Id.* at 55, 212 N.E.2d at 577 (emphasis added).

160. The court stated:

[T]his limited departure by the Restatement and the authorities following it from the harsh majority rule, giving the whole of the appropriation award to the owner of the determinable fee, encourages us to consider whether some greater departure from that harsh rule should be made in the instant case.

Id. at 57, 212 N.E.2d at 578.

161. *Id.* at 58, 212 N.E.2d at 578-79.

162. *Id.*

163. See cases cited in notes 36 & 40-42 *supra*.

164. The court stated:

[A]ny of that money which the city either does not propose to use, cannot reasonably use, or does not use for Ink Park purposes should revert to the plaintiffs.

4 Ohio St. 2d at 58, 212 N.E.2d at 579.

165. *Id.* at 59, 212 N.E.2d at 579.

it offers no concrete framework for evaluating the proportions each party is to receive.

The most novel approach among recent cases has been taken by the Supreme Court of Minnesota. In *State v. Independent School District*,¹⁶⁶ land was conveyed for the use of school children as a playground, and violation of that special limitation was to work a reversion. The state subsequently condemned the land to use as a college athletic field. The president of the acquiring college testified that the state condemned the land because the restriction prevented a voluntary sale, but that the school district had no real objection so long as the condemnation award was sufficient to enable it to duplicate the playground on property directly behind the school. The court expressly rejected the Restatement view as not sufficiently protective of the rights of holders of future interests.¹⁶⁷ More importantly, however, it established a formula by which the condemnation award could be apportioned.¹⁶⁸ The formula to be utilized may be set forth as follows:

(1) Determine the fair market value of the condemned land as if such land would be put to its best use with no restrictions thereon. Call this value *A*.

(2) Determine the value of the condemned land as used only for its restricted purpose. Call this value *B*.

(3) Compare *A* and *B*.

(a) If *B* is equal to or greater than *A* then the owner of the fee simple defeasible gets the entire award minus nominal damages to the holder of the future interest.¹⁶⁹

(b) If *A* is greater than *B*, or, if cessation of the restricted use is imminent, then the owner of the contingent future interest receives a portion of the condemnation award equal to a fraction, whose numerator is the difference between *A* and *B* and whose denominator is *A*, times the total award.¹⁷⁰

166. 266 Minn. 85, 123 N.W.2d 121 (1963).

167. *Id.* at 95, 123 N.W.2d at 129. See note 132 *supra*.

168. 266 Minn. at 95-98, 123 N.W.2d at 129-30.

169. To illustrate, assume that the fair market value of the land in question when applied to its highest and best use is \$75,000. Designate this value *A*. Assume further that the fair market value of the land as used only for its restricted purpose is also \$75,000. Designate this value *B*. Therefore, the holder of the defeasible fee receives the entire award minus some nominal damages, say 1 per cent, which goes to the holder of the future interest.

Note also that *B* can never be larger than *A* by definition. Since *A* is defined as the highest and best use value, and this means the use which results in *A* having its greatest worth, then *B* necessarily must be less than or at most equal to *A*.

170. To illustrate, assume that the fair market value of the land in question when applied to its highest and best use is \$100,000. Designate this value *A*. Assume also that the fair market value of the land as used only for its restricted use is \$75,000. Designate this value *B*. Also, assume that the total condemnation award is \$94,000. The holder of the future interest would receive a portion of the condemnation award equal to a fraction whose numerator is the difference between

By this formula the *Independent School District* court has proposed a means of giving compensation for the future interest of a grantor or his heirs in every case in which the unrestricted fee is more valuable than the restricted fee or termination is imminent. While fairly satisfactory, this formula, it is submitted, may result in a windfall to the grantor when the grantee has paid full value (that is, the equivalent of *A* above) for the defeasible fee.¹⁷¹ In order to eliminate this possibility and maintain the certainty of the formula, it is suggested that a proviso be added to (b) above. This proviso might state:

In no event shall that portion of the condemnation award which is awarded to the holder of the future interest, when added to the consideration received from the purchaser of the defeasible fee, exceed the total condemnation award. Any portion of the condemnation award which exceeds this limit shall be awarded to the holder of the defeasible fee.¹⁷²

Finally, recent decisions indicate that between those jurisdictions that have rejected the Restatement view and those that have retained the

A and *B* (\$100,000 — \$75,000 = \$25,000) and whose denominator is *A* (\$100,000) times the total award (\$94,000):

$$\begin{array}{r} \$25,000 \\ \times \\ \$100,000 \end{array} \quad \$94,000 = \$23,500$$

Therefore, under this formula the holder of the contingent future interest would receive \$23,500 while the holder of the fee simple defeasible would receive \$70,500.

171. It cannot be presumed that the transferee will pay the exact value of what he received. If the value of a parcel of land with no restrictions thereon is estimated, at the time of sale, at \$100,000, and the value of that same parcel with restrictions as to use is estimated at \$25,000, it would not be unusual for a purchaser to pay \$27,000 or \$24,000. This is because the estimates of the property's value differ according to who is doing the appraising. It is equally true that this same parcel may bring a condemnation award less than or in excess of the original estimate of \$100,000.

172. To illustrate, assume that the fair market value of the land in question when applied to its highest and best use is \$100,000. Designate this value *A*. Assume also that the fair market value of the land when applied to its restricted use is only \$25,000. Designate this value *B*. Assume further that the total condemnation award is \$96,000. Finally assume that the transferee paid the holder of the future interest \$27,000 for the defeasible fee. Under the formula proposed by the *Independent School District* court, the holder of the possibility of reverter would receive:

$$\begin{array}{r} \$100,000 - \$25,000 \\ \times \\ \$96,000 \end{array} = \$72,000$$

while the holder of the defeasible fee would receive:

$$\$96,000 - \$72,000 = \$24,000$$

The transferor, therefore, would receive a total compensation of \$99,000 (\$72,000 from the condemnation award and \$27,000 from the original sale of the property). The result is that the transferor receives more than he would have, had he not sold the property but retained it and received only the total condemnation award of \$96,000.

Under the suggested proviso, the holder of the future interest would receive the total value of the condemned property (\$96,000 — \$27,000 from the original sale and \$69,000 from the condemnation award) while the holder of the defeasible fee would receive \$27,000 (\$24,000 as computed without the proviso plus the \$3,000 that the holder of the future interest would not receive). Therefore, the holder of the defeasible fee would receive the same amount as he paid for the defeasible fee while the holder of the future interest would receive the total condemnation value of the land.

old view, are jurisdictions which have not yet rejected the old or Restatement views but have nevertheless expressed doubts as to their validity.¹⁷³

VIII. CONCLUSION

It is clear that the old view, giving any condemnation award to the holder of the defeasible fee, is inadequate, because: (1) the reasoning on which it is based is fallacious; (2) failure to compensate the holder of a future interest may violate constitutional requirements of "just compensation" for the taking of private property; (3) the transferor's intent is frustrated; and (4) when the transferee has had the property conveyed to him as a gift, he receives a windfall by obtaining not only that which he was given and for which he did not pay (the value of the defeasible fee) but that which was withheld from him (the additional value of the land in fee simple absolute).

The Restatement view, although more workable than the old view, fails to adequately protect the rights of holders of future interests — a property right that the Restatement itself recognizes. Moreover, since comments *b* and *c* to section 53 of the Restatement are hardly more than "codifications" of the old view, all of that view's faults are necessarily incorporated in the Restatement position.

The newer views, modifying or rejecting portions of the Restatement, base their results on the equities of the case and as such tend to be more protective of the future interest holder's rights. Additionally, they tend to uphold the intention of the transferor while avoiding windfalls to either party.

Since decisions on point are relatively scarce, it will take time for courts to change the existing law. The suggested answer, therefore, is to encourage legislatures to pass statutes recognizing the property rights of holders of contingent future interests. The statutes should contain precise formulas which dictate, exactly, the proportion each property holder shall receive when his interest is condemned. The formulas should be qualified in order to prevent windfalls to either party. The fact that the recently proposed uniform condemnation code¹⁷⁴ makes no attempt to treat the problem of compensation to the holder of a contingent future interest is some indication that policy-makers may be unaware of the confusion and uncertainty in which the courts find themselves. Although

173. See, e.g., *United Baptist Convention v. East Weare Baptist Church*, 103 N.H. 521, 176 A.2d 325 (1961), where the court, not addressing itself to the question of the rights of a holder of a contingent future interest because the plaintiff made no claim on the condemnation award, nevertheless stated:

In recent years there has become an awareness that future interests in property have not received the protection that they should in eminent domain proceedings. . . . However, in the present case we do not explore the matter since the authorities quoted above represent the majority rule which the plaintiff had not sought to question in this proceeding.

Id. at 524, 176 A.2d at 327 (citations omitted).

174. See 2 *Restatement (Third) of Property: Donative and Trust* J. 365 (1967). This proposed code did not attempt to delineate the various interests in the award.

factual situations wherein defeasible fees are condemned are infrequent, it is not infrequent that large sums of money are involved when the situation does arise. Therefore, during the hiatus between the time legislation is proposed and a meaningful statute is finally enacted, an attorney would be well advised to include, in any conveyance creating a defeasible fee, a clause manifesting the intentions of both the grantor and grantee that, in the event the conveyed parcel of land is condemned, the condemnation award shall be apportioned between the holder of the possibility of reverter or power of termination and the holder of the defeasible fee according to an agreed ratio. Failure to do so may result in inadequate protection of the transferor's intent and may lead to otherwise unnecessary and expensive litigation.

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